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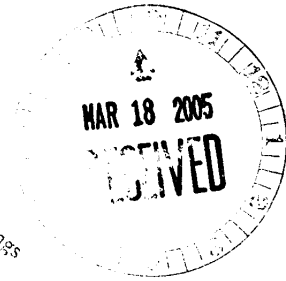
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17 March 2005

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
MAR 18 2005
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Public Record



Re: AB 6 (Sub-no. 335X) > 213577
AB 6 (Sub-no. 346X) 213578
Burlington Northern RR -- Abandonment
Exemption -- Klickitat County

Reply to Motion to Hold in Abeyance

Sirs:


On behalf of Washington State Parks and Recreation Commission, Rails to Trails Conservancy, and Klickitat Trail Conservancy (hereinafter "Trail Owners"), I enclose herewith a Reply, and ten copies thereof, opposing the motion filed by the Zoller Petitioners in the above proceeding on March 14 to hold their Petition in abeyance for 120 days. The proper response to the Motion should be to deny it and to dismiss the Petition.

By my signature below, I certify service by US Mail, postage pre-paid, first class, of the enclosed Reply upon the following counsel of record:

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Respectfully submitted,


Charles H. Montange
for Trail Owners

Encls.

cc. Sydney Strickland, Esq. (BNSF)
Cecilia Fex, Esq. (Zoller)
Barbara Herman, Esq. (State AG's office)
Andrea Ferster, Esq. (RTC)
(w/encls.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Burlington Northern Railroad) 213578
Company -- Abandonment Exemption --) AB 6 (Sub-no. 346X)
in Klickitat County, WA)

Burlington Northern Railroad)
Company -- Abandonment Exemption --) AB 6 (Sub-no. 335X)
in Klickitat County, WA) 213577

Reply
on behalf of
Washington State Parks and Recreation Commission,
Rails to Trails Conservancy, and
Klickitat Trail Conservancy
to
Zoller Motion to Hold in Abeyance 120 Days

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Office of Proceedings
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This Reply, on behalf of Washington State Parks and Recreation Commission, Rails to Trails Conservancy, and Klickitat Trail Conservancy (hereinafter "Trail Owners"), is directed at Petitioners Zoller et al's "Motion to Hold in Abeyance the Petition [filed by Zoller et al] to Re-open" the above-captioned proceedings. In that Motion, which the Zoller Petitioners filed on March 14, the Zoller Petitioners ask this Board to hold the proceeding in abeyance for 120 days while the Petitioners investigate and presumably prepare a reply to the reply filed by Trail Owners.

The Motion filed by the Zoller Petitioners is contrary to STB rules, lacks good cause, is highly prejudicial and must be denied.

Argument

1. Contrary to STB Rules

Without saying so, the Zoller Petitioners in effect are seeking leave to file a reply to the Reply in Opposition filed

by Trail Owners on February 28, and the Reply filed by Burlington Northern and Santa Fe ("BNSF") (pursuant to an unopposed one week extension granted by this Board) on March 7. But this Board's regulations bar replies to replies. 49 C.F.R. § 1114.13(c) states that "[a] reply to a reply is not permitted."

The Zoller Petitioners in effect attest that they currently have no reply to make to the facts as portrayed by BNSF and Trail Owners. In particular, rather than purport to make a rebuttal, the Zoller Petitioners instead indicate they need time to "determine the accuracy and truthfulness of the matters asserted" (Motion at 2) through the verified statements filed by Trail Owners and BNSF under penalty of perjury.

This purported justification for delay suggests two inherent flaws in the Zoller Petition at its inception. First, the Zoller Petitioners filed their Petition knowing that this Board's procedures allow only a Petition and replies thereto. As this Board explained in Central Kansas Railway -- Exemption, AB 406 (Sub. no. 14X), served April 20, 2001, the petitioners "should have made as thorough and accurate a presentation as possible in [their original] petition." In short, before they filed their petition, petitioners were on notice they needed a command of the facts. If they had researched title in Lyle, as they should have, they would not need four months to do so now. They would not need any time at all. Second, if petitioners wished to have the right to file a reply to replies, as their

motion implies, they should have filed an application for an adverse abandonment against the railbanked trail and BNSF's right to reactivate. Application procedures allow for replies to replies. E.g., BNSF -- Abandonment of Chicago Area Trackage, AB 6 (Sub-no. 382X), served Sept. 21, 1999 (rejects BNSF reply to a reply because RR filed a petition not an application). See also Central Railroad Co. of Indiana -- Exemption, AB 459 (Sub-no. 2X), served May 4, 1998 (reply to reply not permitted in petition proceeding). But since the Zoller Petitioners elected to file a petition rather than an application, the rule against replies to replies is properly applied. BNSF, supra; Central Railroad Co. of Indiana, supra.

The verified statements filed by BNSF and Trail Owners are prima facie truthful, accurate and reliable under 28 U.S.C. § 1746. The deeds and documents attached are properly before this Board, and are of public record. The Zoller petitioners had all the time in the world to investigate the issue of land ownership in Lyle, Washington before they filed their Petition to Re-open. The actual facts are now staring them in the face. They do not need more time to examine issues of accuracy and trustworthiness. If the Zoller Petitioners have (or ever should have) anything to show on the issue of accuracy and truthfulness, they could do so now. More important, they should have done so by now by filing a motion for leave to file a reply notwithstanding 49 C.F.R. § 1114.13(c).

But petitioners have obviously not done their homework; by

their admission they have nothing now to say; and they have not followed proper procedures to say anything if they had it to say.

The reason replies to replies are not permitted is because this Board wants parties filing petitions like that of the Zollers to do their homework and state their case in the first instance. STB proceedings (and especially petition proceedings) are not supposed to be initiated with unsubstantiated papers, with the main case reserved for presentation as a rebuttal to whatever replies come in. That would be hugely prejudicial to opponents of petitioners, who in fairness would then have to be given time to file a surrebuttal to the rebuttal. BNSF--Abandonment of Chicago Area Trackage, AB 6 (Sub-no. 382X), served Sept. 21, 1999. Moreover, replies ordinarily must be filed in 20 days (49 C.F.R. § 1114.13(a)). Permitting replies to replies, much less delays for 120 days for replies to replies, would result in proceedings which would drag on and on contrary to national transportation policy to "require fair and expeditious regulatory decisions" (49 U.S.C. § 10101(2)) and to "provide for the expeditious handling and resolution of all proceedings" (id. § 10101(15)).

49 C.F.R. § 1114.13(c) should be applied in this case.

2. No Basis for Motion

Zoller et al argue that in their respective replies, Trail Owners and BNSF presented "new evidence" of ownership south of Highway 14. This argument is fundamentally wrong and

misleading. The gravamen of BNSF's reply was that there was simply no severance because BNSF took care to retain a corridor no less than 28.41 feet wide. BNSF Reply at 8 & supporting Batie Verified Statement at 7-8. As Batie says in his Verified Statement, the "break" which the Zoller petition alleges "never took place." He explains that "Fex [the attorney for the Zoller's] has her facts confused and mixed up because she relies on an incorrect exhibit furnished by Craig Trummel...." Batie, supra, at 8. In other words, the Zoller Petitioners ignored the relevant deeds, or misread them if they did look at them. The Zoller Petitioners instead erroneously relied on an irrelevant deed to Greg Colt Land Brokers, and on erroneous assessor's maps. This reply was also the gravamen of Trail Owner's Reply in Opposition at pp. 11-13.

These showings by BNSF and Trail Owners concerning actual ownership are hardly "new evidence." To the contrary, they are evidence which the Zoller Petitioners, who have the burden of proof, should have fully addressed in their Petition in the first place. Accord, Central Kansas Railway -- Exemption, AB 406 (Sub. no. 14X), served April 20, 2001. Here, petitioners did not even present a title opinion, much less a sworn title opinion by a qualified expert, with their petition. Thus although the facts of ownership may be "new" to the Zoller Petitioners, in that they ignored or were willfully blind to the facts before, that does not make them "new" such that they are now entitled to an order leaving the proceeding which they

instituted open for them to cogitate on the matter for four more months. Ignorance and willful blindness do not convert facts into "new evidence" or otherwise justify "re-do's" or starting afresh.

The only "new evidence" that could conceivably fall in the category of something that did not exist at the time petitioners filed their petition to reopen would be the open space and rail easement which Klickitat Trail Conservancy purchased for the 25 feet to the west of the west boundary of the Goldendale Branch. That purchase serves three purposes: (a) it corroborates that if there had been a "severance,"¹ it was insignificant because the cost to acquire back the property was demonstrably trivial. Trail Owners' Reply at 18. (b) For the future, the easement guarantees that there cannot possibly be a severance. Trail Owners' Reply at 15-16. (c) Finally, although Trail Owners presented evidence that BNSF owns the relevant land in the old Goldendale Branch in fee, if BNSF had only held an easement there (as the Zoller Petitioners might be implicitly arguing) or even if BNSF had deeded some part of the Goldendale Branch to Greg Colt Land Brokers (as the Zoller Petitioners seemed to be arguing), the new easement obtained by Klickitat Trail Conservancy would preserve that as well. In other words, the easement covered 25 feet to the west of the west boundary plus everything adjacent in the Goldendale Branch that would have "reverted" to or been acquired by Greg Colt Land Brokers. See

¹ There was not.

Reply in Opposition at 14 and App. III to Essley Verified Statement in Reply in Opposition. In short, the new open space easement does not alter the land title at the time of the original petition, under which the petition is specious. However, the open space/rail easement does make clear that even if the Zoller petitioners were somehow correct in their erroneous claims, they would still lose. This means that the new open space easement is cumulative and secondary to the key fact that BNSF retained a corridor. BNSF and Trail Owners win regardless of the open space easement; the easement merely serves to guarantee that the Zoller petition and any similar petition dealing with the area south of the highway in Lyle must and would lack merit. As such, it neither justifies an otherwise impermissible reply to a reply, nor any delay, much less one of 120 days, to ponder that which is not permitted. What it does justify is expeditious denial of the Zoller petition.

The only other ground offered by the Zoller Petitioners for an extension, delay, or other impermissible reply to a reply is the claim that BNSF and Trail Owners failed to show that the retained property and/or the Klickitat Conservancy 25 foot open space easement met industry or federal standards for rail service. Zoller Motion at 2-3. But the burden of proof is on the Zoller petitioners, not on BNSF and Trail Owners. Central Kansas Railway -- Abandonment Exemption -- in Marion and McPherson Counties, KS, AB 406 (Sub-no. 6X), decision served May

8, 2001, text at note 12. Petitioners must make showings, not BNSF or the Trail Owners. The petitioners should have researched BNSF's title in the first instance, and made whatever showing they could that BNSF's fee owned property was insufficient for rail. They cannot simply file a petition alleging severance based on unsworn inaccuracies about a total severance, then insist that BNSF and the Trail Owners not only refute their unsworn inaccuracies but also imagine and skewer (in the 20 days allowed under 49 C.F.R. § 1114.13(a) for replies) every hypothesis that these petitioners may subsequently dream up in a sorry excuse to prolong the proceeding. Surely this makes a mockery of the concept of burden of proof, § 1114.13(c), federal transportation policies in favor of expeditious proceedings and decisions, and the reliability of long extant and heretofore unchallenged STB orders.

In any event, the federal clear distance for box cars for obstructions of any height is (at its most stringent) 8.5 feet minimum, 10 feet recommended, from centerline. E.g., WAC 480-60-990. This requires at most a 20 foot wide right of way. Either BNSF's retained corridor, the 25 foot open space easement acquired by Klickitat Trail Conservancy, or both together would be more than adequate for federal regulatory purposes. The Trail Owners' easement follows the west boundary of the old Goldendale Branch, and thus has a tangent (curvature) that presumptively supports rail restoration; after all, the

Goldendale Branch, which the easement wraps on its outer edge, was plainly sufficient for the purpose. In short, the viability of the easement for rail restoration is manifest on its face. The same goes for property retained by BNSF on the west (outer) side of the old Branch.

3. Prejudice

As Trail Owners noted in footnote 1 of our Reply in Opposition, the Zoller Petitioners are long time trail opponents. Their modus operandi is to raise issues, regardless of merit, and then insist these issues be resolved before the trail may proceed. Trail Owners address all legitimate issues, but must insist that specious issues not hold up progress on the trail. In this instance, the issues are specious. The United States Forest Service--Columbia River Gorge currently has funds available for trail development. These funds will be lost if not expended this spring and summer. In light of this specious proceeding currently before this Board, USFS is considering delay or rescission of the funds. Indeed, Trail Owners surmise that the Zoller petitioners are using this specious petition and now this unprecedented motion for 120 days of limbo as a grounds to argue to the USFS that it should not move forward with trail funding and development for the season. In consequence of the funding situation, any delay in, over, or as a result of, this proceeding is highly prejudicial to Trail Owners. This Board should thwart rather than facilitate the Zoller petitioners' effort to employ unwarranted and extraordinary delay as an

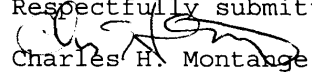
unjustified means to their unjustified end.

Conclusion

If the Zoller petitioners learn how to do their homework (research title), and -- perhaps more astonishingly -- if they would avoid making unfounded claims, they will avoid frivolous petitions such as this in the future, to the relief of this Board's docket. This Board should encourage the Zoller petitioners to get their act together by dismissing their unfounded petition; this Board should not reward their failures by issuing an order putting the petition in some kind of netherworld for 120 days while the petitioners ostensibly search for something they have not got, never had, and should have figured out before they filed in the first place.

Replies to replies in petition proceedings are not permissible, and certainly not replies to replies after 120 days. The petitioners' motion for extraordinary delay while they ponder their lack of basis for an impermissible reply is tantamount to an admission that they have not borne their burden of proof. The petition to reopen accordingly should be summarily and promptly denied. The ill-conceived motion for delay for 120 days certainly must be denied.

Respectfully submitted,


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